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No. 94-1719

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

MOUNTAINWEST FINANCIAL CORPORATION,
Petitioner,

v.

VISA U.S.A. INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

American Express Travel Related Services Company, Inc. ("American Express") is one of the four significant systems competitors in the market for general purpose charge and credit cards in the United States. The other three are the Discover Card, which is issued by an affiliate of Petitioner, Respondent Visa U.S.A. Inc. ("Visa") and MasterCard International Incorporated ("MasterCard").[1] By reason of its overlapping membership with Visa, MasterCard does not engage in significant interbrand competition with Visa. Accordingly, American Express

[1] In addition to these four major systems competitors, affiliates of Citibank, N.A., Visa's largest member, issue Diners Club and Carte Blanche cards.

is the only effective systems competitor which is not a party to this action. If the Court does not issue a Writ of Certiorari to the Tenth Circuit and does not reverse the Tenth Circuit's decision, interbrand competition and consumers will be seriously injured.

STATEMENT OF THE CASE

In 1990, Dean Witter, Discover & Co. ("Dean Witter") purchased the assets of the predecessor to Petitioner MountainWest Financial Corporation ("MountainWest") which was already a member of Visa. Dean Witter thereupon sought to use MountainWest to implement a strategy to issue multiple general purpose charge and credit cards—the Discover Card and a MountainWest Visa card called The Prime Option Card. Visa invoked its By-law 2.06 to prevent MountainWest from issuing its Prime Option Card.[2]

MountainWest commenced this action alleging a violation of Section 1 of the Sherman Act. In the District Court, a jury found that Visa (i) possessed market power in the general purpose charge and credit card market, (ii) exercised that power when it collectively excluded MountainWest from Visa membership, and (iii) thereby injured competition. Accordingly, the jury found Visa had violated Section 1 of the Sherman Act.

On appeal, the Tenth Circuit focused exclusively on the functions in the charge and credit card business which

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[2] At the time of MountainWest's attempt to issue the Prime Option Card, Visa had already adopted By-law 2.06, which purports to exclude from Visa membership any entity which issues Discover Cards, American Express Cards, or any other card deemed competitive with Visa, or an affiliate of any such entity. While Diners Club and Carte Blanche cards are clearly competitive with Visa cards, they are nonetheless exempt from By-law 2.06 solely because they are owned by Citibank. Visa adopted By-law 2.06 in response to an earlier effort by Dean Witter to gain membership in Visa through another financial institution. Although it has not adopted any similar formal, written rules, MasterCard has engaged in the same exclusionary practices as Visa.

are associated with issuing credit cards to consumers. It concluded that, since there were thousands of issuers of Visa credit cards and no one issuer had a dominant share of an "issuer market," Visa did not have market power in the "issuer market." Concomitantly, it concluded that, since elimination of MountainWest as an issuer of Visa cards represented nothing more than the elimination of one of thousands of competitors, there could not be any harm to competition—*e.g.*, consumers. This conclusion led to its analysis of the role of market power as a threshold screen in rule of reason cases and of the business justification for admitted collective restraint on competition which are addressed in MountainWest's Petition For A Writ of Certiorari.

SUMMARY OF ARGUMENT

American Express submits that the rule of law established by the Tenth Circuit is likely to result in significant harm to interbrand competition in the market for general purpose charge and credit cards.

The effect of the Tenth Circuit's decision is that (i) innovative competitors like American Express and Dean Witter will be prevented from issuing Visa or MasterCard cards and (ii) interbrand competition with Visa and MasterCard will be undermined because a wide variety of financial institutions will be deterred from issuing cards bearing their own proprietary brands or the brands of American Express or Discover for fear of denial of the benefits of Visa membership. These restraints on the issuance of such competitively branded cards will limit consumer choice to the brands now available, and the development of new, innovative products will be substantially stifled.

ARGUMENT

I. VISA HAS MONOPOLY POWER WITH RESPECT TO INTERBRAND COMPETITION

The Tenth Circuit limited its analysis of market power and competitive injury to the competition among issuers of bankcards. By focusing solely on such intrabrand competition, it concluded that the "issuer" market is "atomistic" because there are thousands of bankcard issuers and, therefore, held that any collective restraint on new membership was effectively immunized from antitrust scrutiny. It casually brushed aside Dean Witter's effort to focus on the adverse impact on interbrand competition by noting that "[a]lthough the District Court did not end its rule of reason analysis upon that finding [that Visa had market power] the conclusion set the path for its uncharted journey upon a landscape of speculation, conjecture, and theoretical harm." *Visa USA, Inc. v. MountainWest Financial Corp.*, 36 F.3d 958, 969 (10th Cir. 1994).

Furthermore, by limiting its analysis to the impact on competition at the issuer level, the Tenth Circuit ignored the clear realities of the market place. Issuers of credit cards issue cards only in the context of credit card networks or systems, such as Visa and MasterCard. These networks or systems develop and maintain networks of merchants which accept the cards bearing their brands.[3] They also electronically link merchants to issuers of credit cards and provide electronic authorization and financial settlement functions. Without these functions, credit and charge cards are useless and irrelevant to consumers and merchants alike. Visa itself has emphasized the importance of these systems to competition.

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[3] Each of the four general purpose credit card systems markets its services to cardholders and merchants alike through a unique brand associated with the system. Hence intersystem competition is also interbrand competition. As such, the terms will be used interchangeably herein.

> "Certain important functions are (and must be) carried out at the system level. Thus, Visa, itself, provides the mechanisms through which millions of Visa transactions are approved and settled between members every day. *App.* 423-32, 1408. It also defines the quality of service at the point of sale and operates a nationwide lost card and customer complaint service. *App.* 423-32, 1403 A-B. As demonstrated at trial, many technological and product developments are attributable to competition between charge card systems . . . . Similarly, competition with other card brands has prompted Visa to develop numerous product enhancements (e.g. Visa Gold). *App.* 428-33

Opening Brief of Appellant Visa U.S.A. Inc. in The United States Court of Appeals for the Tenth Circuit ("Visa Brief") at 10.

Each of the four major existing systems—Visa, MasterCard, American Express and Discover—performs these functions. The skill with which they do so differentiates them from their rivals and provides a preeminent opportunity for competition and enhancement of consumer welfare. By seeking to improve their systems' functions they are able to attract consumers to utilize cards bearing their respective brands.

Visa itself has aggressively asserted the significance of such interbrand competition:

> "There is also competition at the system level. Thus, for example, Visa (or MasterCard), Discover, and American Express compete on technologies, system functions, advertising and product innovation . . . . The competitive structure at the system level is quite different from that at the issuer level. There are, at most, four or five competing card systems: Visa, MasterCard, Discover, American Express and, in Sears' view, Diners Club. The HHI at the system

> level is a highly concentrated 3231. *See Opn.* 993 at n.433." [4]

Visa Brief at 61-62.

Because virtually all banks that belong to Visa also belong to MasterCard, banks that issue MasterCard cards do not engage in any serious competitive activity against Visa at the brand level. Moreover, since Visa and MasterCard control in excess of 70% of the business conducted in the general purpose charge and credit card market, the Tenth Circuit concluded that

> "these raw figures may suggest Visa USA possesses market power in the intersystem market."

Visa v. MountainWest, 36 F.3d at 967.

However, by limiting its analysis of market power and competitive injury to competition at the individual issuer level, the Tenth Circuit ignored this Court's holding that "interbrand competition . . . is the primary concern of the antitrust law." *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 52 n.19 (1977). It also ignored a trial record replete with evidence of injury to interbrand competition caused by By-law 2.06.

The jury found that By-law 2.06 had a harmful effect on interbrand competition. Dean Witter would not have developed its proprietary Discover card had it known that it would be faced with an either-or choice between competing solely within Visa or from without. (Appendix 320-21)[5] Dean Witter instead had a multicard strategy

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[4] It should be noted that this admission by Visa that the credit card industry is "highly concentrated" by itself would render By-law 2.06 suspect under the Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust issued jointly by the Antitrust Division of the U.S. Department of Justice and the Federal Trade Commission on September 22, 1994, which provide that exclusivity arrangements in joint ventures with greater than 20% share will receive heightened scrutiny.

[5] Since no appendix has yet been filed in this Court, references to the record herein are to the Appendix and Supplemental Ap-

(*i.e.*, proprietary brand plus a Visa or MasterCard brand) predicated on the belief that the ability to compete effectively in the credit card market required access to the nearly universal coverage that Visa's 6,000 members had achieved by pooling their vast resources. The effect of By-law 2.06 will be that actual and potential issuers of general purpose charge and credit cards will be deterred from pursuing such a multicard strategy. (Supplemental Appendix M490-514, M515-51, M688-89) The ability to pursue multicard strategies would unquestionably strengthen interbrand competition by creating cost efficiencies and permitting competitors to utilize economies of scale and scope not otherwise available. (*See e.g.*, Supplemental Appendix M700-04, M708, M710-12, M281-339, M627; Appendix 750-54, 1097, 1549-68)

However, By-law 2.06 has foreclosed these procompetitive activities. Accordingly, no firm has attempted to introduce a new general purpose proprietary card outside the two bankcard networks since enactment of By-law 2.06. Indeed, expert testimony at trial established that By-law 2.06 "provide[s] a very, very substantial disincentive, a kind of penalty, if you will, for the development of new proprietary cards in this market." (Appendix 690, 763)

Although the jury and the District Court considered all this evidence of competitive injury to interbrand competition and found that Visa's By-law 2.06 violated the antitrust laws, the Tenth Circuit ignored it and ruled as a matter of law that Visa's restraint of competition did not violate the Sherman Act, even if it made Dean Witter a less effective competitor.

The Tenth Circuit's failure to analyze the impact of Visa's By-law 2.06 on interbrand competition caused it to reach two fundamentally flawed conclusions. First, it

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pendix filed by the parties in the United States Court of Appeals for the Tenth Circuit.

held that neither Visa nor any of its members possessed market power, thereby ignoring Visa's overwhelming market dominance in the systems (*e.g.*, interbrand) market. This erroneous finding of the absence of market power led it to conclude that, under a rule of reason analysis, Visa's By-law 2.06 could not, as a matter of law, pose a significant competitive threat. Consideration of intersystem competition would have led to a contrary result.

Second, the Court limited its evaluation of actual injury to competition to its effects on competition between individual issuers, thereby wholly ignoring the serious injury, at the interbrand level, to competition and consumers resulting from By-law 2.06.

II. VISA'S BY-LAW 2.06 SUBSTANTIALLY RESTRICTS COMPETITION AND CONSUMER CHOICE IN INTERBRAND COMPETITION

Visa's By-law 2.06 is not incidental or innocent. It was adopted and has been enforced by Visa as part of a collective plan to undercut the utility of the general purpose cards of credit card systems which compete with Visa.

The utility (usefulness) of a credit card product to a card holder depends upon a variety of closely interrelated features such as value, customer service and merchant acceptance of the card. Similarly, the utility of a credit card product to merchants who accept it is dependent upon features such as discount rate, payment terms and volume of traffic. The strength and vitality of a credit card system/brand is directly dependent upon the interrelationship of two sets of factors which determine card utility. For example, the utility of a card to a card holder turns in large part on whether it is accepted at the business establishments he or she frequents. A card which is not accepted at virtually all airlines, car rental agencies, hotels and restaurants would have relatively low utility for a frequent business traveler. On the other

hand, a card which is widely accepted at such travel and entertainment locations, but not in retail establishments, such as service stations, pharmacies and hardware stores, would have relatively little utility to a nontraveler who wished to use a credit card primarily for retail purchases. Thus, the degree of merchant coverage is a critical component of utility, which determines whether a consumer will carry a particular card.

Merchants, on the other hand, are induced to accept a card for purchases based upon their perception that a great many consumers carry the card and will use it if the establishment accepts it, thereby increasing the merchant's volume of business. Thus, a card which is carried predominantly by business travelers may not be of great interest to local retail establishments.

A credit card system grows or diminishes in strength by the interplay of these different characteristics of utility. If a credit card system, such as American Express, can successfully increase the number of merchants who accept its products in given industry segments, then its success in increasing the number of card holders will be directly enhanced. This enhanced number of card holders will cause an increased demand to use the card at merchant locations, which results in expanded merchant coverage. The reverse is also true. Diminished merchant coverage reduces the number of card holders which, in turn, tends to further reduce merchant coverage. This growth (or shrinking) of networks by the interplay of factors external to the network itself—mutually reinforcing merchant and card holder perceptions—is common to all network businesses such as telephone companies, automated teller machine ("ATM") networks and airlines. Such "network externalities" can, and do, determine competitive success in all networks and particularly in the credit card business. Put starkly, more card holders results in more merchants and more merchants results in more card holders.

This undeniable economic phenomenon renders absurd Visa's "property rights" argument, that it has restricted Visa membership in order to preserve the benefits of the joint venture. Permitting new aggressive issuers access to Visa's network could only increase network externalities and thereby render the joint venture more valuable for all of Visa's members. In fact, Visa is constantly admitting new members almost without regard to their affiliations so long as they do not issue a competitive card product. The fact that Visa has acted to diminish the impact of such network externalities can only be explained by Visa's desire to limit interbrand competition.

A. By-law 2.06 Erected Barriers To Entry Which Have Prevented New Entry

It is undisputed that Dean Witter decided to create its own proprietary system, and thereby introduce a new brand onto the credit card landscape, only as part of a multicard strategy which also included issuing a bankcard under at least one of the Visa or MasterCard brands. Dean Witter would not have considered introducing a new brand had it known it would be required to forego the economies of scale and financial benefits of bankcard association membership. Hence, if By-law 2.06 had existed at the time Dean Witter launched Discover, it would have joined Visa or MasterCard instead of introducing its proprietary card.

At the time of the launch of Discover, Visa identified over 100 firms which it considered "potential competitors" to Visa. Some of those firms were already members of Visa while others were not. They included companies such as Ford Motor Credit Co., General Electric Capital Corp., ITT Financial Corp., General Motors Acceptance Corp., and Chrysler Financial Corp., all of which had the financial and technical resources, together with existing networks of dealer and consumer relationships, which could potentially form the basis for the creation of a credit card system under a proprietary brand,

rather than the Visa brand. By adopting By-law 2.06, and subsequently enforcing it against MountainWest, Visa quite effectively served notice that the consequences of attempting to create a competitive brand of credit card was the loss of the huge financial benefits of Visa membership. By-law 2.06 also deprived such "potential competitors" of the technological and financial economies of scale inherent in a multicard strategy. Thus, By-law 2.06 dramatically increased the costs of establishing a new brand. Faced with these barriers, not one of the 100 "potential competitors" has attempted to launch a new proprietary brand. Virtually all of them have instead opted for Visa and or MasterCard membership.

The deterrent impact of the barriers to entry sanctioned by the Tenth Circuit's opinion is not limited to the charge and credit card market. The rule of law established by the Tenth Circuit is that any network joint venture may deny access to its network without regard to the extent of the joint venture's market power. Thus, whereas a single firm network with monopoly power would be constrained in its access rules by the antitrust laws, *see, e.g., MCI Communications Corp. v. AT&T*, 708 F.2d 1081 (7th Cir. 1983), *cert. denied*, 464 U.S. 891 (1983), under the Tenth Circuit's ruling a joint venture with monopoly power has no such restraints. This rule of law may have very harmful effects in other joint venture network situations, *e.g.*, ATM's, debit cards, telecommunications joint venture and health care provider networks.

B. By-law 2.06 Was Intended To Limit Opportunities For American Express To Expand The Scope Of Its Interbrand Competition With Visa

The market for general purpose charge and credit cards is quite dynamic. It is growing rapidly and evolving, as demand emerges for new products. Similarly, new technological developments by credit card systems make possible an ever widening variety of products targeted at

increasingly differentiated consumer segments. American Express has historically been a leader in developing and introducing such innovative products.

For example, American Express has developed and introduced corporate card and purchasing card products which are extremely attractive to business customers. The unique combination of discount structure, customer service, world wide capabilities, travel services and management information systems developed by American Express has given these American Express products significant competitive advantages. Those features make issuing an American Express branded corporate card or purchasing card product, which would be processed over the American Express network, highly desirable to a wide variety of financial institutions which might be interested in entering the credit card business.

American Express may wish to expand its interbrand competition with Visa by entering into arrangements with financial institutions which would issue American Express branded corporate or purchasing card products. Visa's By-law 2.06, however, will cause these institutions to be reluctant to consider entering into such arrangements with American Express. For the same reasons that none of Visa's "potential competitors" have decided to issue a "competitive" card under their own brand, no such institution will likely forego the potential benefits of Visa membership if that is the price of issuing an American Express branded card.[6]

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[6] Nor is this impact limited to American Express. The same effect will undoubtedly be felt by the fledgling credit card network that Dean Witter has developed. Dean Witter intends that the network of merchants that accept Dean Witter's Discover Card will be capable of supporting additional cards, which could be issued by Dean Witter or other firms. So long as By-law 2.06 remains in effect, however, it is highly unlikely that Dean Witter's network (which it calls the "NOVUS Network") will attract third party cards or become a serious competitor against the Visa network.

This deterrent effect of By-law 2.06 will be precisely that planned by Visa—a reduction of the effectiveness of innovative products offered by interbrand competitors with a reduction of potential transaction volume on their networks. Visa's intention in enacting and enforcing By-law 2.06 was to interfere with the network externalities of competitors and thereby undercut interbrand competition. Unless By-law 2.06 is invalidated, Visa may succeed and its already dominant position will become even more entrenched.

C. Visa's By-law 2.06 Prevents American Express From Expanding Its Innovative Product Offerings

Visa's By-law 2.06 precludes American Express from offering innovative charge and credit card products which bear brands owned by American Express, but which utilize the Visa network and share the Visa brand.

Through the collective resources of its 6,000 member banks, Visa has been able to develop a network of merchants who accept Visa branded products which provides nearly universal coverage and is extremely difficult for a single firm such as American Express or Dean Witter to duplicate in a timely and cost efficient manner. In order to strengthen its system and compete more effectively, in addition to continuing to offer card products on the American Express network, American Express may want the option of issuing credit card products bearing brands and offering services introduced by American Express, but utilizing the Visa network. American Express would thus have the ability to create products which have not been, and cannot be effectively, offered by current Visa members. Such products would enhance consumer well-being by linking credit/charge card services to other products and services which are unique to American Express. They would, at the same time, enhance American Express' market relevance and provide it with significant cost efficiencies and technological economies of scope and

scale, with the overall effect of strengthening American Express' ability to compete with Visa.

The pro-competitive, and pro-consumer, effect of such innovative product offerings has been eliminated by Visa's By-law 2.06. The effect is that consumers who require nearly universal coverage are relegated to accepting those products which the Visa membership chooses to offer and are denied the option of selecting unique, innovative products designed by American Express or Dean Witter. Moreover, these anti-competitive effects will occur in a context in which products which could be offered by American Express or Dean Witter over the Visa network would have increased the efficiency of the Visa network to the advantage of all existing Visa members. The only explanation for these restrictions is Visa's desire to further entrench Visa's dominant position.

The harmful impact of the Tenth Circuit's upholding By-law 2.06 transcends Visa's dominance of the credit card industry. The Visa joint venture, directly or through affiliates, controls other vital networks within the U.S. payment system, including debit card, ATM and merchant processing networks. Emboldened by the Tenth Circuit's decision, Visa will now feel free to use its monopoly power to further exclude competitors in these other critical areas. If Visa's anticompetitive practices are not restrained, there is a dangerous probability that Visa will ultimately achieve its long-articulated goal—to dominate and control the payment systems, leaving no room for competition.[7]

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[7] *See, e.g., Behind the Credit Card Network Grand Prix*, Credit Card Mgmt. 42, 43 (Sept./Oct. 1988), quoting Roger Peirce, then an executive vice president at Visa, "Visa expects to dominate the transmission of transactions between sources and destinations. I'm not sure there's room for anyone else."

CONCLUSION

For the reasons stated above, American Express respectfully submits that A Writ of Certiorari To The United States Court of Appeals should issue and the decision of that court should be reversed.

Respectfully submitted,

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